

(Publication page references are not available for this document.)

SINCE 1972

In 1972, the United States Supreme Court struck down all of the death-penalty statutes existent in the several states. [FN15] The Court held that vesting the sentencer (juries in those days) with unbridled discretion to determine whether the death penalty should be imposed was both "cruel and unusual," as Justice Potter Stewart observed, "in the same way that being struck by lightning is cruel and unusual." [FN16] Unfortunately, there was no clear majority holding in *Furman*, and the states began to reenact death-penalty statutes based upon their interpretations of the various opinions in *Furman*. [FN17] Today, thirty-eight states and the federal government provide for capital punishment as a possible penalty for the most serious crimes. [FN18] One other state, Massachusetts, is considering enacting a death-penalty law. [FN19]

Trials in capital cases differ from other criminal trials because, after the defendant is found guilty of a capital offense, the jury participates in a post-verdict hearing to determine whether the death penalty should be imposed. [FN20] These hearings are sometimes referred to as the "penalty phase" or "presentence hearing." [FN21]

While the procedure used to determine the penalty differs from state to state, arriving at that decision is the most difficult task presented to a judge or jury. And, due to the finality and severity of the death penalty, no decision receives more judicial scrutiny. Judicial review takes place in both state and federal courts, and it is not unusual for these courts to review a single case a number of times. For instance, the following courts considered or reviewed Charles William Proffitt's case the number of times indicated: Florida Circuit Court (four times); Florida Supreme Court (four times); United States District Court (two times); United States Circuit Court of Appeals (11th Circuit) (three times); United States Supreme Court (two times). [FN22]

A. Death-Penalty Schemes in the United States

After the *Furman* case, various states began to enact new death-penalty schemes. The United States Supreme Court ultimately approved three basic schemes, and every state that has the death penalty follows one of those schemes. The schemes are known as the Florida scheme, [FN23] the Georgia scheme, [FN24] and the Texas scheme. [FN25]

1. The Florida Scheme [FN26]

Florida was the first state to reenact the death penalty after the dust settled from the *Furman* case. [FN27] Two other states, Alabama and Delaware, follow the Florida scheme. [FN28] The Florida scheme requires the jury to unanimously find a defendant guilty of first-degree murder. [FN29] Then, the same jury--unless the defendant waives a jury--hears evidence to establish statutory aggravating factors and statutory or nonstatutory mitigating circumstances. [FN30] The aggravating factors need not be listed in the indictment [FN31] but must be established beyond a reasonable doubt. [FN32] The fact-finder must only be "reasonably convinced" as to the existence of mitigating factors. [FN33]

If the jury finds one or more aggravating circumstances and determines that these circumstances are sufficient to recommend the death penalty, it must determine whether sufficient mitigating circumstances exist to outweigh the aggravating circumstances and, based upon these considerations, recommend whether the defendant should be sentenced to life imprisonment or death. [FN34] However, even if the aggravating circumstances are found to outweigh the mitigating circumstances, the jury is never required to return a recommendation for death and must be so instructed. [FN35] A simple majority of the jury is necessary for recommendation of the death penalty. [FN36] It is not necessary for the jury to list on the verdict the aggravating and mitigating circumstances it finds or to disclose the number of jurors making such findings. [FN37] With rare exceptions, the judge must give the jury recommendation "great weight," but the judge makes the final decision as to the penalty. [FN38] The judge has the authority to override a jury recommendation of a life sentence in limited circumstances, [FN39] but, "in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." [FN40]

